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697-168—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 295

GERALD A. GUIDARELLI, A/K/A GERARDO A. QUINDARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10a–12a) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1963. Petition for rehearing was denied on June 24, 1963 (Pet. 13a). The petition for a writ of certiorari was filed on July 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the government to show a taxable source of income by

evidence that petitioner had engaged in gambling activities.

2. Whether petitioner was prejudiced when, after the special agent had testified concerning his conversations with petitioner's wife, the trial court struck from the net worth statement all items based on such testimony.

3. Whether the prosecutor's remarks in summation were improper.

4. Whether the government's net worth statement was properly received into evidence.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C., 1958 ed., Sec. 7201.)

STATEMENT

1. On December 19, 1961, an indictment in three counts was filed against petitioner in the United States District Court for the Northern District of New York, charging that he had wilfully attempted to evade and defeat his income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal

Revenue Code of 1954. The indictment alleged that he had reported an income tax liability of $533 for 1956, $395 for 1957 and $844.09 for 1958, whereas his correct tax liability for those years was $1,622.65, $2,140.10 and $1,921.16. (R. 141–143.)[1] After a seven day jury trial, petitioner was found guilty on counts one and two, and not guilty on count three. On November 26, 1962, the District Court imposed concurrent sentences of imprisonment for six months on each count, and fined petitioner a total of $2,500. (Pet. 9a.)

2. The evidence to support the verdict of guilt, the sufficiency of which is unchallenged by petitioner, may be briefly summarized as follows:

(a) *Proof of petitioner's tax deficiencies.*—During the prosecution years, petitioner operated a news stand and gift shop, known as "Lee's News," located in Schenectady, New York. According to his 1956 and 1957 income tax returns, petitioner's sole source of income was from "Lee's News," and he reported a net profit from this business of $4,218.71 in 1956 and $3,538.94 in 1957 (Ex. 67; Pet. 7a). Petitioner, during the Internal Revenue investigation of his tax returns, could produce no books and records to verify the income reported by him on his returns. (R. 60.) Accordingly, the special agent proceeded to reconstruct petitioner's income by means of the net worth method. (R. 87.)

At the trial, upon the basis of the testimonial and documentary evidence in the case (R. 88), the govern-

[1] Record references are to the government's appendix in the court of appeals.

ment submitted its net worth statement graphically portraying petitioner's tax deficiencies for the years involved (Ex. 67; Pet. 7a). The net worth statement revealed that petitioner had failed to report taxable income amounting to $5,828.61 in 1956 and $8,550.67 in 1957, with a resulting tax deficiency in those years of $1,113.41 and $1,776.30, respectively. (Ex. 67; Pet. 7a; R. 109–113.)

(b) *The source of the unreported income.*—While petitioner's tax returns reported income only from his news and gift shop establishment, his accountant, Fred Etoll, informed the special agent during the investigation that petitioner also conducted a gambling operation. (R. 39.) Since petitioner had no books and records with respect to these gambling activities (R. 39), the government introduced evidence to demonstrate that his unreported income was derived in part from gambling receipts.

The evidence, as introduced at the trial, established that petitioner, on July 8, 1955 and August 13, 1958, applied to the Internal Revenue Service for a federal wagering stamp, and filed excise tax returns which disclosed that he had derived income by accepting wagers (R. 56); that the Schenectady vice squad engaged in continual surveillance of petitioner's activities as "part of [their] daily routine of checking on gambling in Schenectady" (R. 2); that petitioner was arrested in 1955 on bookmaking and policy charges (R. 65); that on July 14, 1955, petitioner paid a $1,000 fine for these offenses to the Police Court of Schenectady (R. 6-7); that on August 13, 1958, the vice squad raided petitioner's gambling operation and

took from him $596 in currency, together with various gambling paraphernalia, including two way radios, flash paper, etc. (R. 2–3); that, as a result of evidence uncovered in this raid, petitioner was arrested for gambling; and that in his 1958 income tax return, under the section "Other Income," petitioner disclosed that he received $1,940 as a "commission agent" for "sporting events" (R. 66). Petitioner informed the special agent that this latter amount represented money which he had won by betting on various sporting events (R. 66). Petitioner further admitted to the special agent that he had made money betting in years prior to 1958, but that "when he prepared those returns himself, he never thought of reporting income from betting." (R. 67.)

(c) *Evidence of wilfulness.*—To prove the element of wilfulness, the government introduced evidence that petitioner had engaged in a course of conduct calculated to conceal the magnitude of his business operations and designed to prevent the investigation thereof. This evidence established that petitioner, during the prosecution years, maintained no records for either his newsstand and gift shop business or with respect to his gambling operation (R. 39, 60); that petitioner's financial transactions were carried on largely through the use of currency, including currency transactions in the form of loans, gambling receipts, automobile purchases, payment of legal fees, and payments for certain household items (Ex. 67, Items 2, 4, 7, 18, 21, 23, 24; Pet. 7a); and that during the prosecution years petitioner made cash purchases of several automobiles, which he caused to be placed

in the names of various relatives (Ex. 67, Item 18; Pet. 7a).

ARGUMENT

1. There is no merit to petitioner's complaint (Pet. 4–5) that the trial court erroneously permitted the government to introduce evidence relating to his gambling and bookmaking operations in the City of Schenectady. The evidence about which petitioner complains pertains chiefly to his arrests for bookmaking in 1955 and 1958, his conviction for these offenses, and the payment by him in 1955 of a $1,000 fine. (See Statement, *supra.*) This evidence was introduced, not only for the purpose of establishing various assets and expenditures in the government's net worth statement (Ex. 67, Items 3, 4, 20; Pet 7a), but also to show that petitioner's unreported income came from a taxable source, *i.e.*, gambling receipts. *Holland* v. *United States*, 348 U.S. 121, 137.

Petitioner seeks to minimize the importance of the government's duty to prove a taxable source of income [2] by arguing that the allegedly prejudicial nature of this evidence outweighed its probative value.

[2] Petitioner seems to doubt (Pet. 5) that such a duty exists when the evidence—as in the instant case—has already demonstrated the existence of one taxable source, *i.e.*, Lee's News. But where, as here, the defendant keeps no books and records to establish the income potential of his business, and where it cannot be legitimately claimed that the business is one with "indeterminate possibilities" of producing income (*United States* v. *Costello*, 221 F. 2d 668, 672 (C.A. 2d), affirmed, 350 U.S. 359), it is clear that the government can, and must, establish an additional source of income. *Holland* v. *United States*, *supra*, 137–138; *United States* v. *Calderon*, 348 U.S. 160, 165–166.

(Pet. 5.) That argument is unsound.[3] It is a well settled rule that evidence relevant to the proof of one crime is not inadmissible merely because it discloses the commission of another. *United States* v. *Eury*, 268 F. 2d 517, 520 (C.A. 2d) (and cases cited therein). While such evidence admittedly may tend to create prejudice against a defendant, the trial court, in its discretion, may admit such testimony by weighing its probative value against the possibility of prejudice. *United States* v. *Krulewitch*, 145 F. 2d 76. (C.A. 2d).[4] These principles apply with equal force to a prosecution for tax evasion, and are especially pertinent to a net worth case, where the govern-

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[3] We note that there is no support in the record for petitioner's claim that he "offered to stipulate that he was a professional gambler." (Pet. 5.) Moreover, had such a stipulation been offered, the government need not have accepted it. *Parr* v. *United States*, 255 F. 2d 86, 88 (C.A. 5th), certiorari denied, 358 U.S. 824.

[4] In the instant case the prejudice, if any, was dispelled by the trial court's final instructions to the jury, as follows (R. 135):

"The Government contends that this defendant was engaged during the pertinent years in a news business or running a store and the Government contends that in addition he was engaged in the matter of making or taking bets. The nature of his business is not important except insofar as it relates to the disclosure or non-disclosure of income.

"You may not punish this defendant because he may have been violating some state law. That is not for us.

"We here in the Federal Court are not interested in it and because he may have violated a state law is no reason and no basis for a conviction here. Your determination must rest on the crime charged in the indictment and on nothing else."

Petitioner took no exception to the court's charge. (R. 140.)

ment, to show a taxable source, adduces evidence that a defendant derives his income from illegal activities.

Applying these principles to the instant case, it is clear that the failure of petitioner to account for his unreported income, either by keeping records or otherwise, made it necessary for the government to introduce evidence that his income was derived from a taxable, albeit an illegal, source.

2. Petitioner asserts (Pet. 6–7) that the special agent's testimony concerning his conversations with petitioner's wife violated both the spousal privilege and hearsay rules. Little need be added to the comments of the court of appeals in rejecting this argument (Pet. 11a–12a):

> * * * While we agree that the testimony in question presents some interesting questions as to the application of both the spousal privilege rule and the hearsay rule, we need not concern ourselves with them here. For Judge Brennan had second thoughts about this aspect of Special Agent O'Sullivan's testimony and, on his own motion, ordered the items in the net worth account based upon the wife's statements stricken from the record. * * *

While petitioner concedes that this is so (Pet. 6–7), he claims that "the rest of the controversial testimony" was allowed to remain in the record. (Pet. 7.) We are not aware of either the "controversial testimony" to which petitioner refers, or how he was prejudiced by leaving such alleged testimony in the record.

3. Petitioner objects (Pet. 7–8) to various comments of the prosecuting attorney in summation. While the court of appeals believed that the prosecutor "did overstep the bounds in summation," it did "not feel that these comments were sufficiently prejudicial to warrant reversal." (Pet. 12a.) We need only add that at no time during or after the closing argument of the prosecuting attorney did petitioner offer any objection. (R. 128–129.)

4. Petitioner complains, finally (Pet. 8–9), that the trial court should not have admitted into evidence the government's net worth statement. At the trial, petitioner did not object to the admission of the net worth statement, except to allege that some of the items therein "were based on incompetent and insufficient evidence." (R. 116.)

The use of such summaries of the evidence in complicated income tax prosecutions has long been recognized. *Swallow* v. *United States*, 307 F. 2d 81, 84 (C.A. 10th), certiorari denied, 371 U.S. 950, (and cases cited therein). In *Holland* v. *United States*, *supra*, pp. 127–128, this Court implicitly sanctioned the use of such summaries, but warned that they might be given unwarranted emphasis if sent to the jury room without guarding instructions. In the instant case, the trial court did not even permit the net worth computation to be sent to the jury room on the ground that it "may be an overemphasis of evidence which is already in the record." (R. 131.) Moreover, the court correctly advised the jury concerning the pur-

pose of such summaries, and their function in the case.[5] It is clear that the trial court soundly exercised its discretion in admitting the net worth computation into evidence.

CONCLUSION

Further review by this Court is unwarranted. There is no conflict of decisions, and no important question of law is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1963.

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[5] The Court instructed the jury as follows (R. 130-131):

"There is another type of evidence in this case which I should refer to. That is you have been given a copy of what we call a chart or a computation. Those charts—this chart computation is placed before you in the form of an exhibit and their sole—and its sole purpose is to assist the jury in understanding complicated facts and figures lengthy in number. There is no use of us deceiving ourselves. You cannot carry in your mind the number of figures that have been testified to in this litigation. Neither can I. The summaries are received not as independent evidence in themselves; they are not bits of evidence. They are not proof, because they are put down in their particular form on a particular paper, but they are an aid and a help to the jury. They are for the convenience of the jury. They are not independent or actual evidence. They are not to be given any special emphasis because they are put down on paper which you can see and, they are not to be emphasized over other evidence in this case."

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